

# **EXHIBIT I**

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
3 BEFORE THE HONORABLE DAVID A. GARCIA, JUDGE  
4 LAW & MOTION DEPARTMENT

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6 WILLIAM R. SETZLER, )  
7 PLAINTIFF, )  
8 VS. ) NO. 979587  
9 RETIREMENT BOARD OF THE CITY )  
10 AND COUNTY OF SAN FRANCISCO, )  
11 DEFENDANTS. )

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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 THURSDAY, OCTOBER 22, 1998  
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28 REPORTED BY: JOSEPH HAYDEN VICKSTEIN, CSR #4780

1     A P P E A R A N C E S:

2     For the Plaintiff:

3     SAN FRANCISCO POLICE OFFICERS ASSOCIATION  
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1 THURSDAY, OCTOBER 22, 1998

Morning Session

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4 THE CLERK: Line 20, Setzler versus Retirement  
5 Board.

6 MR. BENJAMIN: Good morning, Your Honor. David  
7 Benjamin for the Retirement Board.

8 MR. HEBEL: Good morning, Your Honor. Mike Hebel  
9 on behalf of the Moving Party, Petitioner William Setzler.

10 THE COURT: Well, you know, a judge can be  
11 prejudiced by inappropriate comments by a lawyer? Can't  
12 happen. We are computers. Put the information in, kick out  
13 the responses. Can't make appeals to our emotion. We don't  
14 have emotions. Certainly you can't make an argument that is  
15 inappropriate and have that sway the Court.

16 MR. HEBEL: Your Honor, I realize what you are  
17 talking about. But the main gist of this motion --

18 THE COURT: Other than that, where is the new  
19 evidence and the new law?

20 MR. HEBEL: Under this motion, Your Honor, I am  
21 really asking you to reweigh the evidence because --

22 THE COURT: I understand that. You are saying the  
23 trial court -- which is the other premise of this. We don't  
24 have new evidence. We don't have new law.

25 MR. HEBEL: We have new evidence, Your Honor. We  
26 have the declarations by the Petitioner. We have the  
27 declarations by the Counsel to the Sheriff who I have asked  
28 to be here and who is sitting in the courtroom,

1 Mr. Harrigan.

2 THE COURT: But what do those establish for me?

3 MR. HEBEL: What they establish is that --

4 THE COURT: Because I am still dealing with a  
5 record, aren't I. This is not a trial de novo where I take  
6 new evidence. So we have a fixed record. It's the  
7 administrative hearing, is it not?

8 MR. HEBEL: It is.

9 THE COURT: Okay. So you are asking me to look at  
10 that record and determine whether or not -- and remind me,  
11 what is the standard of review here?

12 MR. HEBEL: Independent judgment.

13 THE COURT: Independent judgment. So I weigh the  
14 evidence. That's what I thought I was doing. And determine  
15 whether or not the evidence supports the decision made by  
16 the hearing officer. But the problem is, is you are asking  
17 me on new trial. See, so I think it's no longer an  
18 independent evidence test. The independent evidence test  
19 would be if I were the original judge ruling on the Writ of  
20 Mandate, right?

21 Unfortunately, you are now asking me -- and I know  
22 it's an unfortunate circumstance because I wasn't that  
23 judge.

24 MR. HEBEL: That's right.

25 THE COURT: For me to reconsider that, in effect,  
26 that judge's decision. Judge no longer being available. I  
27 guess I am per force the judge that has to make a decision  
28 in this case. You are asking me now to say that that judge

1 clearly erred as a matter of law, aren't you?

2 MR. HEBEL: Your Honor, I believe I am asking you  
3 for today to be Judge Williamson. Even though you can't,  
4 but to stand in his shoes.

5 THE COURT: I understand. You are asking me. But  
6 I guess my question to you is this: On a Motion for New  
7 Trial, is the standard that I have now to reweigh the  
8 evidence for the second time? Assumptively I have weighed  
9 the evidence once and come up with the answer, "Petition for  
10 Writ of Mandate denied," right?

11 MR. HEBEL: Yes.

12 THE COURT: And now the question is, having done  
13 that, you are asking me to look at my prior decision and  
14 assess whether or not that decision is wrong as a matter of  
15 law, right?

16 And I guess I am struggling with, does that mean  
17 that on a Motion for New Trial following the denial of Writ  
18 of Mandate that the test is exactly the same as it was  
19 before?

20 MR. HEBEL: I believe on this motion, we are  
21 requesting and you are required to reweigh the evidence that  
22 supports --

23 THE COURT: All right.

24 MR. HEBEL: -- supports or does not support the  
25 findings.

26 THE COURT: Okay. And it's important to  
27 understand, because this is where the case is won or lost, I  
28 think, on the test. Do you agree that that's the test,

1 Counsel?

2 MR. BENJAMIN: I agree that the test is  
3 independent judgment when the Writ of Mandate was tried  
4 before Judge Williamson, and I believe that now the  
5 Petitioner is coming forward and asking in essence the trial  
6 judge to change his mind and arguing that the evidence  
7 doesn't justify what the trial court did.

8 THE COURT: But what is the test? What is the  
9 test? The substantial evidence test? All right. You  
10 haven't really addressed that in your Points and Authorities  
11 in opposition, have you?

12 MR. BENJAMIN: You are right. We did address the  
13 evidence that supports it.

14 THE COURT: So you in essence conceded for  
15 purposes of this discussion that it's a weight of the  
16 evidence test?

17 MR. BENJAMIN: I'm sorry, Your Honor?

18 THE COURT: I think you conceded that it was a  
19 weight of the evidence test, not having addressed the issue.  
20 I merely raise it on my own, because I am not sure that it  
21 is. But that's my struggle. Go ahead.

22 MR. HEBEL: Your Honor, I realize you are at  
23 somewhat of a disadvantage in that this is a massive file  
24 attached to it which Judge Williamson saw.

25 What we are really asking you to take another look  
26 at it, this is a Deputy Sheriff who has now been off work  
27 without a disability retirement and without reinstatement to  
28 employment, exactly today, for 3,215 days. He had an

1 admitted injury on January 2nd, 1990.

2 THE COURT: Yes.

3 MR. HEBEL: He's received all benefits legally  
4 obligated to give him by law. He ran out of everything in  
5 May of 1996.

6 We have set forth -- the most disturbing part of  
7 the judgment, has to do with the indication that first of  
8 all, he's not credible. And secondly, that he did not make  
9 good faith efforts to return to work.

10 THE COURT: I understand that. That those  
11 judgments were made by the hearing officer. And of course  
12 that is -- once we start talking about credibility, I think  
13 we start running into some difficulty with the standard.  
14 Because credibility, even on a Writ of Mandate, is something  
15 that the courts generally look very closely at the record  
16 and will accord some significant respect to the party that  
17 is the judicial officer, if you will, and quasi-judicial  
18 officer that heard the evidence, won't we? They see the  
19 demeanor of the witness.

20 MR. HEBEL: It's a question as to whether he made  
21 good faith efforts to return to work.

22 THE COURT: I understand.

23 MR. HEBEL: And we submitted significant numbers  
24 of declarations indicating that he has.

25 THE COURT: But you see, I don't think that I am  
26 entitled to consider that.

27 MR. HEBEL: All right. Let me ask you if you are  
28 entitled --



1 THE COURT: Am I? Am I entitled to now expand  
2 this record, in essence to reopen the trial? I mean it is a  
3 limited trial de novo. And I agree that there might be some  
4 circumstances under which it is that a court might open the  
5 case up. But isn't that extremely limited, and it's not one  
6 of the circumstances that we have in this case?

7 MR. HEBEL: I believe you are entitled to take a  
8 look at it. You are entitled to look at it.

9 THE COURT: I looked at it. But that doesn't mean  
10 that I put it into that computer that I was talking about  
11 before, when I spit out my answer.

12 MR. HEBEL: Let me ask you to put this into your  
13 computer, Your Honor. The Court relied upon two doctors.

14 THE COURT: The Court?

15 MR. HEBEL: The first, Judge Williamson.

16 THE COURT: Yes, but the Court was not really  
17 relying on the two doctors. The Court was looking at the  
18 record that was presented to it. And those two doctors were  
19 in that record and it made a determination.

20 MR. HEBEL: The Court said it relied upon those  
21 two doctors to come up to a conclusion that Mr. Setzler,  
22 Deputy Setzler was neither neurologically nor orthopedically  
23 disabled from employment.

24 THE COURT: Okay.

25 MR. HEBEL: And this has been the enormous  
26 difficulty in the case. Mr. Setzler goes back to those  
27 doctors, especially Doctor Clifford, to get a medical  
28 release. And the doctor refuses to see him or give it to

1 him.

2 The Sheriff's Department says, and continues to  
3 say, "Without that medical release, we will not take you."  
4 That's really the crux of the matter that brings about this  
5 lack of good faith effort, lack of subjective symptoms.

6 This Deputy Sheriff, Your Honor, has been  
7 evaluated by at least four orthopedics. At least three  
8 neurosurgeons and three psychiatrists. None of whom find  
9 that his complaints and subjective symptoms are not  
10 credible.

11 The hearing officer, ALJ Stuart Judson, did not  
12 find that. Actually, he found that Mr. Setzler wanted to  
13 return to work on a light duty. Judge Cahill, when it was  
14 before him, never said that this particular Deputy Sheriff  
15 was not credible.

16 These two findings, which are the basis, in my  
17 judgment, for the Court's ruling, simply do not have  
18 anything supporting them. And what they do is so far  
19 overweigh what is in opposition to them.

20 MR. BENJAMIN: This is a case with a long history.  
21 It is a factual case. The fundamental issue is whether the  
22 Petitioner is disabled from working. And that determination  
23 of disability turns in large part on his credibility.

24 Three triers of fact have looked at it.  
25 Administrative Law Judge, Judge Judson; Judge Cahill; Judge  
26 Williamson. All of them have found that Petitioner is not  
27 disabled for the performance of his duties.

28 There is nothing new in the evidence that -- or in

1 the papers that Petitioner has submitted in support of his  
2 Motion for New Trial. He's made the same arguments before.  
3 He made them to Judge Williamson. He made them to Judge  
4 Cahill.

5 The essence of the problem regarding Petitioner's  
6 return to work is that Petitioner claims that the Court's  
7 decision puts him in a Catch 22 situation. But the only  
8 Catch 22 is the one that Petitioner has created for himself.

9 He tells the Court that he can't return to work,  
10 but at the same time since 1990 and continuing right up  
11 until the present, he claims that he's disabled and that he  
12 can't work.

13 THE COURT: I understand that. That was  
14 consistent. I think what you meant to say is he can return  
15 to work and that he is also disabled.

16 MR. BENJAMIN: I must have misspoke. That's  
17 right. Those are inconsistent. And we have set forth in  
18 detail the evidence that supports the Court's judgment.

19 MR. HEBEL: Your Honor, I really can do no more  
20 than show you as he is. And that's what he's done. And  
21 were Mr. Harrigan to step up next to me, he could verify  
22 that. Mr. Setzler cannot show up as he has multiple times  
23 at the Sheriff's --

24 THE COURT: Is the Sheriff ready to take him back?

25 MR. HEBEL: The Sheriff is not ready to take him  
26 back, Your Honor.

27 THE COURT: Okay.

28 MR. HEBEL: Why? Because they have a light duty

1 policy. And because the policy says that Mr. Setzler must  
2 obtain a medical release in order to report back to work.

3 THE COURT: Why does he have to get it back --

4 MR. HEBEL: Pardon me, Your Honor?

5 THE COURT: Why did he have to go back to -- Well,  
6 what you basically said to me is the doctor that he needed  
7 to get the medical release from refused to even see him.

8 MR. HEBEL: Your Honor, no doctor --

9 THE COURT: But that doctor also found that he  
10 wasn't disabled. So I am not sure how that plays.

11 MR. HEBEL: I must have misspoke. No doctor has  
12 given him a medical release.

13 THE COURT: I understood that. I understood that.

14 MR. HEBEL: His treating doctors, also the  
15 evaluating doctors. Simply none have.

16 THE COURT: All right.

17 MR. BENJAMIN: Your Honor, it's up to -- the  
18 release argument is not Petitioner's claiming not claiming  
19 he can go back to work. He is claiming that he's disabled  
20 and can't work.

21 The argument that he won't be released to work is  
22 a ploy to advance his disability pension claim. It's the  
23 disability pension claim that we are here on. He claims  
24 that he's disabled. His argument that he can't return to  
25 work is inconsistent with the very litigation that he's  
26 maintaining.

27 THE COURT: All right. I will take it under  
28 submission. Thank you, very much.

1 MR. HARRIGAN: Your Honor, would you, would it be  
2 productive if the Sheriff's position would be advanced to  
3 the Court?

4 THE COURT: You can tell me what it is. I guess  
5 the record should be complete.

6 MR. HARRIGAN: James Harrigan, attorney for the  
7 Sheriff appearing.

8 Your Honor, I have seen most of the pleadings in  
9 this case. And I read Judge Williamson's decision. The  
10 only clarification I wish to state for the record is this:  
11 The Sheriff's policy is that an injured deputy sheriff may  
12 return to work and may be considered for a modified  
13 assignment for a short period of time, provided that upon  
14 presenting himself or herself for reemployment, they have a  
15 physician's letter or document that says that they can  
16 return to full duty within 90 days.

17 Mr. Setzler has appeared with and without counsel  
18 at the office of the Sheriff several times over the past few  
19 years. Without having the benefit of that letter, I have  
20 been advised that he cannot obtain that due to his injury.  
21 I have read the reports. There are no doctors reports that  
22 I have seen that say that he can fulfill the duties of a  
23 deputy sheriff.

24 In fact the last letter, the last evaluation by  
25 Doctor Coughlin, who was appointed by Judge Cahill,  
26 specifically to do a medical analysis, found that  
27 Mr. Setzler is disabled; cannot perform the functions and  
28 the duties of deputy sheriff.

1           There's been some suggestion that he has refused,  
2   to abide by the policies of the Department. And rather than  
3   get into a discussion about form over substance, I think  
4   it's clear from a medical perspective, as to everything I  
5   have seen, this gentleman cannot perform the role of a  
6   Deputy Sheriff and therefore cannot be considered for  
7   reemployment. And that's -- I'd be happy to answer any  
8   other questions.

9           MR. BENJAMIN: I'd like to address that, Your  
10   Honor.

11           Judge, Petitioner has been relying on Doctor  
12   Coughlin throughout this litigation. He comes into Judge  
13   Cahill two years ago and he tells Judge Cahill, "The Sheriff  
14   won't let me return to work."

15           And so Judge Cahill said, "Why don't you go talk  
16   to Doctor Coughlin. That's your treating doctor."

17           And then the Petitioner went to Doctor Coughlin  
18   and told Doctor Coughlin that he can't do the work. He  
19   comes into court and he tells the Court that the Sheriff  
20   won't return him to work and then he brings the sheriff a  
21   note from his doctor saying that he can't go back to work,  
22   based on what the Petitioner himself told the doctor.

23           MR. HEBEL: Your Honor, he is as he is. And --

24           THE COURT: What you are saying is that he's not,  
25   that he's maintained a consistent position that he can't  
26   return to work?

27           MR. HEBEL: He has maintained --

28           THE COURT: But don't you see, what that says to

1 me is, is that if it's determined that he is not disabled,  
2 if, there's -- if the weight of the evidence supports that  
3 decision, then my response is a very simple response.

4 If the weight of the evidence supports the  
5 decision that he's not disabled, then categorically the  
6 weight of the evidence supports the decision that he's  
7 malingering. And that he has not done what was necessary to  
8 get himself reinstated to the job. Okay?

9 Because this is what this is about, isn't it?  
10 He's either disabled or he's a malingerer. And as cold and  
11 as cruel that may sound, that's what it's about. And that's  
12 where my analysis is. And that's where it's going to rest.  
13 It's on the simple question.

14 Because if he's not disabled, then he's not  
15 entitled to judgment here. If he is disabled, then I  
16 suppose the review should be granted on the grounds that  
17 he's disabled and he should be given his disability  
18 retirement. All right.

19 MR. HEBEL: There's clarity to what you said. The  
20 difficulty is that the doctors who say, the doctor says he's  
21 not disabled; won't give him the opportunity to go -- won't  
22 give him the slip to give to Mr. Harrigan, so he can go back  
23 whether he's disabled or not and do it.

24 THE COURT: But that's not my problem. That is  
25 not my problem. Okay? You know, I am not going to question  
26 that doctor at this point in time. If he's going to another  
27 doctor who says he can't go back to work, in essence because  
28 he's relying on the patient's subjective complaints about

1 symptoms, so be it.

2 MR. HEBEL: Your Honor, that other doctor, Doctor  
3 Coughlin, is the City-appointed treating doctor. It's not  
4 as though Mr. --

5 THE COURT: I don't know what it means to be a  
6 "City-appointed treating doctor."

7 MR. HEBEL: There are two kinds. The employee  
8 selects or the City selects.

9 THE COURT: But it doesn't make a difference to  
10 me, I think.

11 MR. HEBEL: It should in terms of --

12 THE COURT: A treating physician is a treating  
13 physician. I don't understand what you mean by -- I mean we  
14 are not talking about an Independent Medical Examiner.

15 MR. HEBEL: That, we do have one. We do have an  
16 Agreed Medical Examiner, who also found disability. Doctor  
17 Henry Eddington.

18 MR. HARRIGAN: If I may point out one final point.  
19 Doctor Coughlin was provided a written description of the  
20 duties of the deputy sheriff, including all the physical  
21 requirements of the job.

22 I am not able to recall exactly how he phrased it  
23 in his letter, but my belief is that his assessment of  
24 Setzler's disability and ability to return to work was based  
25 in part, possibly largely in part, on his objective review  
26 of what the job requires, vis-a-vis the injury that's been  
27 documented. So to say that this was -- that he dashed off a  
28 letter only because the patient said "I can't go to work."



1 I don't think that's true.

2 MR. BENJAMIN: Your Honor, may I please? I'm  
3 sorry.

4 THE COURT: I said, "submitted," I think almost  
5 ten minutes ago. But that's all right. Go ahead.

6 MR. BENJAMIN: All of the doctors know what a  
7 deputy sheriff does. They all evaluated the Petitioner. In  
8 that respect, Doctor Coughlin is the doctor who said that  
9 what he has is a mystery and he doesn't know what it is.  
10 And all he's doing --

11 THE COURT: The fact that he has a mystery doesn't  
12 mean that he's not disabled.

13 MR. BENJAMIN: But he's accepting Petitioner's own  
14 statement that he can't work.

15 THE COURT: Nothing wrong with that. Sometimes  
16 the only evidence of a person's ailment is the person's  
17 complaint about his ailment. But ultimately we have to  
18 assess that. All right. Thank you, very much.

19 MR. BENJAMIN: Thank you.

20 MR. HEBEL: Thank you, Your Honor. Not by way of  
21 argument, but there are five videos presently in the Court's  
22 possession, and I would request that they stay in your  
23 possession until the parties have agreed to a disposition.  
24 That is that they not be destroyed, Your Honor.

25 THE COURT: I destroy nothing, personally.

26 MR. HEBEL: Thank you.

27 THE COURT: I am a packrat.

28 MR. BENJAMIN: Thank you, Your Honor.

(Whereupon, the proceedings were adjourned.)

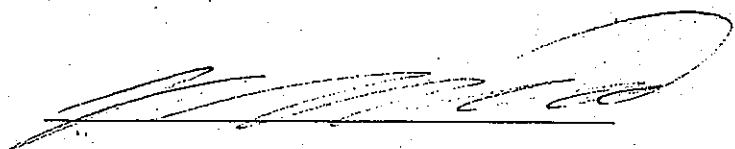
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REPORTER'S CERTIFICATE

I, Joseph Hayden Vickstein, an official reporter of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify:

That the foregoing transcript, as reduced to transcript by computer under my direction and control to the best of my ability, is a full, true and correct computer transcription of the shorthand notes taken as such reporter of the proceedings in the above-entitled matter.



Joseph Hayden Vickstein, CSR #4780